UNITED
NATIONS

CAT

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.
GENERAL

CAT/C/9/Add.1
20 March 1990

Original: ENGLISH

COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1990

Addendum

NETHERLANDS

[14 March 1990]

CONTENTS

| | Paragraphs | Page |
|---|---|---|
| Introduction | 1 - 4 | 1 |
| I. THE NETHERLANDS | | |
| Part One: Information of general nature | 5 | 3 |
| Introduction | 5 - 6 | 3 |
| A. General legal framework | 7 - 19 | 3 |
| B. Obligations arising from other international agreements | 20 | 13 |
| C. Relationship between the Convention and the national legislation | 21 - 23 | 14 |
| D. Judicial authorities | 24 | 14 |
| E. Legal remedies | 25 - 28 | 15 |
| F. General conclusions | 29 | 15 |

CONTENTS (continued)


| | | Paragraphs | Page |
|---|---|---|---|
| Part two: | Information in relation to each of the articles in part I of the Convention ..... | 30 - 77 | 16 |
| | II. ARUBA | | |
| Part one: | Information of general nature ..... | 78 - 90 | 34 |
| Part two: | Information in relation to each of the articles in part I of the Convention..... | 91 - 113 | 35 |

Annexes

| | | |
|---|---|---|
| I. | Act implementing the Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment ..... | 39 |
| II. | Amendment to the Police Act ..... | 42 |
| III. | Articles 1 to 11 of the Decree establishing a Code of Police Conduct ..... | 43 |

## Introduction

1. This report is submitted in accordance with article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which entered into force with respect to the Kingdom of the Netherlands on 21 January 1989. The present initial report is submitted in accordance with the general guidelines regarding the form and contents of initial reports which were provisionally adopted by the Committee against Torture at its first session on 20 April 1988. This report will focus on the period from 21 January to 1 September 1989.

## Structure of the Kingdom of the Netherlands

2. The present constitutional structure of the Kingdom of the Netherlands dates back to 1954, when, after several years of study, discussion and negotiation, it was decided by the Netherlands, Suriname and the Netherlands Antilles (then including Aruba) to establish a new constitutional order under which they (according to the Charter for the Kingdom, the constitutional document which was promulgated) "will conduct their internal affairs autonomously and in their common interests on a basis of equality and will accord each other reciprocal assistance". Thus the Kingdom, while remaining one sovereign entity under international law, came to consist of three co-equal partners which have distinct identities and are fully autonomous in their internal affairs.

3. Since then, two important changes have taken place. In 1975 Suriname decided - with the full assent of the partners - to leave the Kingdom and become a sovereign State in its own right. In 1986 Aruba became a separate country within the Kingdom, under the Charter, and therefore now has the same constitutional status as the two other countries, the Netherlands and the Netherlands Antilles.

4. The Charter, the highest constitutional instrument of the Kingdom, is a legal document *sui generis*, which is based upon its voluntary acceptance by the three countries. It falls into three essential parts. The first part defines the association between the three countries, which is federal in nature. The fact that together the three countries form one sovereign entity implies that a number of matters need to be administered by the countries together, through the institutions of the Kingdom (wherever possible, the organs of the countries shall participate in the conduct of these affairs). These matters are called Kingdom affairs. They are enumerated in the Charter, and include the maintenance of independence, defence, foreign relations, and the safeguarding of fundamental human rights and freedoms, legal stability and proper administration. The second part deals with the relationship between the countries as autonomous entities. Their partnership implies that the countries respect each other and render one another aid and assistance, materially and otherwise and that they shall consult and co-ordinate in matters which are not Kingdom affairs but in which a reasonable degree of co-ordination is in the interest of the Kingdom as a whole. The third part of the Charter defines the autonomy of the countries, which is the principle underlying the Charter; the countries govern themselves according to their own

wishes, subject only to certain conditions imposed by their being part of the Kingdom. Elementary principles of democratic government, observance of the Charter and Kingdom legislation, and the adequate functioning of the organs of the country are matters of concern to the whole of the realm. Conversely, although Kingdom affairs are matters for the Kingdom as a whole, the countries play active roles in the way they are conducted. In foreign relations, for example, the countries themselves, under the aegis of the Kingdom, deal with matters the substance of which is in their autonomous sphere.

READEX FICHE

# I. THE NETHERLANDS

## Part One: Information of general nature

### Introduction

5. The Government of the Kingdom of the Netherlands signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 4 February 1985. The authentic English and French versions of the Convention, and the Dutch translation, were published in the Netherlands Treaty Series of 1985, no. 69. The Kingdom of the Netherlands deposited its instrument of ratification on 21 December 1988 and the Convention came into force for the whole Kingdom on 20 January 1989, as announced in the Netherlands Treaty Series of 1989, no. 20.

6. On ratifying the Convention, the Kingdom of the Netherlands made the following declarations:

> "The Government of the Kingdom of the Netherlands hereby declares that it recognizes the competence of the Comittee against Torture, under the conditions laid down in Article 21, to receive and consider communications to the effect that another Party claims that the Kingdom is not fulfilling its obligations under this Convention.
>
> "The Government of the Kingdom of the Netherlands hereby declares that it recognizes the competence of the Committee against Torture, under the conditions laid down in Article 22, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by the Kingdom of the provisions of the Convention."

With regard to Article 1:

> "It is the understanding of the Government of the Kingdom of the Netherlands that the term 'lawful sanctions' in article 1, paragraph 1 must be understood as referring to those sanctions which are lawful not only under national law but also under international law."

### A. General legal framework

7. The "Act implementing the Convention on Torture" was passed on 29 September 1988 and published in the Bulletin of Acts, Orders and Decrees of 1988, no. 478. It entered into force on 20 January 1989, at the same time as the Convention entered into force for the Kingdom of the Netherlands.

8. The English translation of the Dutch Act implementing the Convention on Torture is annexed to this report and should be referred to where necessary (see Annex I).

9. The Dutch Constitution does not expressly prohibit torture. It does, however, contain provisions in the context of which the provisions of the Act implementing the Convention which make torture a criminal offence should be considered. Article 1 reads as follows:

"All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."

Article 11 reads:

"Everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament."

Article 10, paragraph 1 of the Constitution is also of relevance in this context in that it supplements Article 11:

"1. Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament."

The relationship between Articles 10 and 11 was the subject of discussion during the drafting of the Constitution. It was suggested that the right to respect for one's privacy automatically included the right to inviolability of the person. Although sometimes no clear distinction can be made between the violation of one's physical integrity and that of one's mental integrity, it can be argued that in so far as Article 11 offers no protection against violations of a person's mental integrity, Article 10, paragraph 1 does.

Article 15 reads:

"1. Other than in cases laid down by or pursuant to Act of Parliament, no one may be deprived of his liberty.

2. Anyone who has been deprived of his liberty other than by order of a court may request a court to order his release. In such a case he shall be heard by the court within a period to be laid down by Act of Parliament. The court shall order his immediate release if it considers the deprivation of liberty to be unlawful.

3. The trial of a person who has been deprived of his liberty pending trial shall take place within a reasonable period.

4. A person who has been lawfully deprived of his liberty may be restricted in the exercise of fundamental rights in so far as the exercise of such rights is not compatible with the deprivation of liberty."

Finally, Article 114 of the Constitution reads:

"Capital punishment may not be imposed."

10. Chapter XX of Book Two of the Dutch Criminal Code contains provisions relating to various forms of assault (Articles 300 to 306). It will be explained in the following paragraphs why these Articles were considered insufficiently specific to serve as a basis for the prosecution of suspects for offences which can be defined as torture within the meaning of the Convention. Furthermore, Chapter XVIII of Book Two of the Criminal Code contains various provisions defining offences against personal liberty (Articles 274 to 286), including one which renders it an offence to make serious threats (Article 285).

11. Sections 1 and 2 of the Act implementing the Convention define the offence of torture. These read as follows:

"Section 1.

1. Assault committed by a public official or other person acting in an official capacity in the exercise of his office on a person who has been deprived of his liberty, for the purpose of obtaining information or a confession, punishing that person, intimidating him or another person, or forcing him or another person to perform certain acts or to allow them to be performed, or out of contempt for his right to be treated as an equal human being shall, if such behaviour is of such a nature that it is capable of assisting the achievement of the objective in question, be deemed to constitute torture; the penalty upon conviction of this offence shall be a term of imprisonment not exceeding 15 years or a fifth category fine.

2. The intentional inducement of a state of acute anxiety or any other form of serious mental disturbance shall be deemed to constitute assault.

3. If the offence leads to death, the offender shall be liable to life imprisonment or a term of imprisonment not exceeding 20 years or a fifth category fine.

Section 2.

The following shall also be liable to the punishments described in the preceding section:

(a) Any public official or other person acting in an official capacity who, by employing one of the means referred to in Article 47, paragraph 1 (2) of the Criminal Code, incites another person to commit the form of assault referred to in Section 1, or intentionally allows another to commit the said form of assault;

(b) Any person who commits the form of assault referred to in Section 1, if a public official or other person acting in an official capacity has, in the exercise of his office, incited him to do so by employing one of the means referred to in Article 47, paragraph 1 (2) of the Criminal Code or has intentionally allowed the said form of assault to be committed."

The following points should also be noted. A fifth category fine is one amounting to a maximum of Fl.100,000. Article 47, paragraph 1 (2) of the Criminal Code reads as follows:

"The following shall be liable to the same punishment as the actual perpetrators of an offence:

any person who by means of gifts, promises, abuse of authority, violence, threats or deception, or by providing the opportunity, the means or information, intentionally incites another to commit the offence."

12. The Act implementing the Convention on Genocide served as a model for the Act implementing the Convention on Torture. The decision to draft a separate Act rather than to incorporate the offence of torture in the Criminal Code was taken for the following reasons.

There is no doubt that acts which come under the description of the term "torture" in Article 1 of the Convention are already offences under existing Dutch legislation, more specifically under the provisions of the Criminal Code referring to assault occasioning bodily harm (mishandling) and serious assault (zware mishandling).

However, the Convention also requires that a number of special provisions be established governing cases in which assault qualifies as torture. These are:

1. the establishment of universal jurisdiction;

2. that no grounds for immunity from criminal liability based on the fact that an official order or a statutory provision is involved may be allowed;

3. that the offence be classified as one for which extradition may be requested and that extradition requests be allowed from other parties to the Convention in respect of this offence, even where no extradition treaty has been concluded with such parties;

4. the provision of legal assistance in cases involving this offence, including cases in which national legislation requires that such assistance be given on the basis of an international agreement and where no agreement governing legal assistance has been concluded with the other parties to the Convention.

In order to satisfy its obligations under the Convention, the Netherlands has chosen to formulate a separate offence of "torture" and to incorporate it in a separate Act which provides for exceptions to generally valid principles of criminal law in respect of this offence.

13. The choice facing the legislature was either to classify the phenomenon of torture as a form of serious assault within the meaning of Article 302 of the Criminal Code or as a form of ordinary assault occasioning bodily harm within the meaning of Article 300 of the Code. The Code in fact distinguishes between:

(a) Simple assault, possibly aggravated by its consequences (serious physical injury or death), which also includes intentionally impairing someone's health (Article 300);

(b) Premeditated assault occasioning bodily harm, possibly aggravated by its consequences (serious physical injury or death) (Article 301);

(c) Serious assault, i.e. intentionally causing serious physical injury, possibly aggravated by its consequences (death) (Article 302) and

(d) Serious premeditated assault, possibly aggravated by its consequences (death) (Article 303).

Attempted simple assault is not an offence. The definition of serious physical injury as referred to in Article 82 of the Criminal Code also includes illness in which there is no prospect of complete recovery, permanent unfitness to perform official or professional duties, miscarriage in a woman and any disturbance of mental capacity which lasts for more than four weeks.

The Government outlined the reasons for its choice in the Explanatory Memorandum accompanying the Act:

> "Like the International Covenant on Civil and Political Rights (Article 7) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the Convention distinguishes between torture and other forms of cruel, inhuman or degrading treatment or punishment. This distinction is further refined in the case law of the judicial bodies charged with the interpretation of the European Convention. According to the European Court of Human Rights, the difference between torture and other inhuman or cruel treatment is to be found mainly in the difference in intensity of the suffering caused. In the words of the Court: 'It was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.' The Court referred to resolution 3452 (XXX) of the United Nations General Assembly which describes torture as an 'aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment' (Judgments of the Court, 18-1-1978, Ireland versus UK, Publ. Court A, vol. 25; 25-4-1978, Tyrer case, Publ. Court A, vol. 26; and 25-2-1982, Campbell and Cosans, Publ. Court A, vol. 48).
>
> "Translating this to the terminology of Dutch legislation, only extremely serious forms of assault are therefore eligible for the designation 'torture'. However, defining these as forms of 'serious' assault (zware mishandling) within the specific meaning of Article 302 of the Criminal Code would in a certain sense not do justice to the purport of the provisions of the Convention. Serious assault assumes the causation of serious physical injury, which also includes the form of mental injury referred to in Article 82, paragraph 2 of the Criminal Code. Torture, however, may take forms which cause extreme pain or mental anguish without leaving any trace of physical or mental injury. For this reason, the use of the specific term 'serious assault' (zware mishandling) in the Act implementing the Convention would be inadequate. Where the proposed provisions speak of assault (mishandling) and not of serious assault (zware mishandling), it should not be assumed that this also covers forms of assault which are less serious with regard to the intensity of the suffering caused than serious assault causing physical injury. The fact that the proposed provision refers to an aggravated and therefore serious form of assault arises on the one hand from the circumstances and objectives of the offence as described in the Act, and on the other from the stipulation that the actions in question be of such a nature that they are capable of furthering the objective. The provision only refers to the inflicting of pain to that end, which in practice entails extreme pain.
>
> "Furthermore, in view of the provisions of the Convention, a separate subsection makes it clear that forms of assault which cause mental suffering rather than physical pain may also constitute torture. The

provision in question requires that a state of acute anxiety or another form of serious mental disturbance be induced intentionally. Because the forms of assault deemed to constitute torture are forms of aggravated assault, as we have explained above, the attempt to commit such an offence is also a criminal offence."

14. Turning to the status of the person who perpetrates or instigates such an offence, he or she must be a public official or someone who is acting in an official capacity. The term "public official" refers to those persons who come under the scope of the Dutch Central and Local Government Personnel Act, i.e. persons employed by the Dutch public authorities. In addition, Article 84 of the Criminal Code states that for the purposes of the application of the criminal law, this category also includes persons elected to public office in an election called in accordance with statutory provisions and all members of the armed forces, including persons called up under the Emergency Services Act when on active service.

Those persons who have entered into a contract of employment with the public authorities are not public officials but are covered by the term "persons acting in an official capacity". The latter also applies to persons performing occasional services for the authorities, such as doctors. In order for them to have committed an offence under the Act, however, they must have acted as persons working in an official capacity when carrying out their duties.

The Convention's requirement that extraterritorial jurisdiction be established necessitated the drafting of a provision under which the term "public official" would also include officials in the service of a foreign power (Section 6, subsection 2 of the Act implementing the Convention).

During the discussion of the Act in Parliament, it was pointed out that this provision may prove difficult to apply, since torture often occurs in situations such as internal revolt or resistance to an invading force. It is not only officials of the legal Government who may be guilty of torture: resistance workers or members of the liberating forces may also perform such acts. To what extent may they be deemed to be "public officials or persons acting in an official capacity"?

The Government's reply to this was as follows:

"It is certainly possible that in situations involving armed conflict, including internal conflict, both sides will use torture, and it is not always clear under such circumstances who is actually in authority. It would appear that the decisive factor is whether the person suspected of applying torture was acting at the time under the authority of an organization recognized by the Dutch Government as the one acting with governmental authority; for the purposes, inter alia, of the Convention, the Dutch Government would assume extradition to be possible between itself and that organization.

"The Dutch courts cannot reasonably be expected to apply any formal criteria other than these when assessing the applicability of the provision in question and their own competence to pass judgement on this point".

15. In addition to the external characteristics of the offence (the intentional infliction of severe pain or suffering, whether physical or mental), the definition refers to two motives on the part of the perpetrator, at least one of which must be present if the act is to qualify as torture. The parliamentary papers have this to say on the way in which this requirement is embodied in the Act:

> "The first motive involves the violation of the physical or mental integrity of the victim in order to force him or another person to perform a certain act or to punish him for his or another's actions (extracting a confession or statement, punishment, intimidation). The other involves discrimination directed against another human being: in other words, the victim is tortured not for what he has or might have done but because of what he is, because of that which distinguishes him from his fellow human beings. In the Act the phrase 'contempt for the victim's right to be treated as an equal human being' was preferred to the open-ended 'discrimination' of any kind, used in the Convention.
>
> "Where the term 'discrimination' is used in criminal law provisions, it is customarily followed by an exhaustive list of the qualities on which discrimination may be based. Such a list would, however, do no justice to the Convention, which is why a formulation is proposed which, without departing from the structure of the criminal law, avoids the word 'discrimination'."

It should be pointed out that Article 90 quater of the Criminal Code contains a definition of the concept of discrimination, which reads: "Any form of distinction, exclusion, restriction or preference whose aim or possible consequence is that the recognition, enjoyment or exercise on an equal footing of a person's human rights or fundamental freedoms in the political, economic, social or cultural field or in any other sphere of public life is impaired or destroyed." In this connection the Government noted:

> "In our view, the definition contained in Article 90 quater of the Criminal Code, which was written with the offences described in Articles 137, c-e and 429 ter and quater of the Code in mind, is not suitable for use in connection with torture. In particular, the requirement that the distinction, exclusion, restriction or preference must apply to the exercise of rights or freedoms in the sphere of public life, would appear to us irrelevant. What we are concerned with here is the maltreatment of persons because they are considered inferior on account of their race, sex, religion, colour, political convictions or nationality, regardless of whether they manifest or wish to manifest the quality in question during the exercise of their rights or freedoms in the sphere of public life. There are no grounds for amending the terms of Article 90 quater, but the above constitutes good grounds for avoiding the word 'discrimination' in the Act implementing the Convention on Torture."

16. The term "for the purpose" indicating the causal relationship between assault and motives will give rise in practice to serious problems with regard to evidence. Nevertheless, the Convention uses the same term in Article 1 (for such purposes as, aux fins de). The following remarks on this point are contained in the parliamentary papers:

"We consider it quite correct that stringent requirements with regard to evidence need to be fulfilled before an offender can be convicted of torture. This does not mean that the 'purpose' could not be established solely from the circumstances of the case without an express statement from the suspect."

17. The Act lists only two types of "purpose" and does not allow for the possibility that assault for other purposes might also constitute torture. It might be suggested that the Convention has left this possibility open, since Article 1 uses the term "such purposes as". The following observations were made by the Government during the written preparations for the discussion in Parliament of the Act implementing the Convention:

"In the Government's view, the effect of this element of the Convention's description of the prohibited acts is to invite interpretations based on analogy; going even further, if it was incorporated in the description of offences in national criminal law in the same way, it could not be deemed to satisfy the requirements of specificity which the nulla poena principle, as embodied in Article 1 of the Criminal Code, imposes on the drafting of criminal law provisions.

"Disregarding the requirement of specificity could also be in contravention of an international norm, i.e. that contained in Article 7 of the European Convention for the Protection of Human Rights and Article 15 of the International Covenant on Civil and Political Rights, which also embody the nulla poena principle. Case law concerning Article 7 of the European Convention indicates that applying a particular national criminal law norm by analogy is not permitted, unless such a step would be to the advantage of the person concerned (see the case law of the European Commission of Human Rights in the cases 1852/63 X v. Austria, 6683/74 X v. the United Kingdom and 7721/76 X v. the Netherlands). Furthermore, the legal certainty which is the objective of the nulla poena principle demands of the legislature that criminal law norms be clearly and unambiguously formulated and of the judiciary that they be interpreted as narrowly as possible. This is the only way to avoid criminal proceedings being instituted on the basis of a particular norm, whilst the accused neither could nor should reasonably be expected to have known in advance that his behaviour was a violation of that norm. Such considerations also apply to cases such as that being discussed, which involve an obligation to make the violation of a principle of criminal law subject to extraterritorial, that is to say, universal jurisdiction.

"The Act implementing the Convention endeavours to implement the obligations arising from the Convention against Torture in a way which is compatible with those arising from the Conventions on human rights and with the general principles governing Dutch criminal law. It would have been acceptable to list other motives in the description of the offence contained in Section 1 of the Act, provided they had been sufficiently clearly defined. However, no such other motives occurred to the Government or to the drafters of the Convention."

18. The Dutch Government found it necessary to include in the description of the offence in the Act implementing the Convention the stipulation that the assault had to be perpetrated on a person who had been deprived of his

liberty. It is true that the Convention does not state this explicitly, at least not in Article 1. It can, however, be inferred, particularly from Articles 10 and 11. The Government considered this to be an essential element which had to be explicitly expressed in the Dutch legislation because:

> "...it is one of the essential features distinguishing torture from other forms of inhuman treatment. There are four such features: the extreme nature of the suffering inflicted, the abuse of official powers, the physical accessibility of the victim and the special motives for the assault."

It is difficult to see how the terms of the Convention regarding the offence can be fulfilled unless the victim has been deprived of his liberty. If one takes a situation in which serious assault is committed on persons who have not been deprived of their liberty, for example if a demonstration held by members of a minority group is broken up by means of brute force, this can in no way be regarded as an act which would qualify as torture.

The words "deprived of his liberty" should not be so narrowly interpreted as to cover only the period in which a person is actually in detention. As soon as a person is informed that he has been arrested, during a house search for example, then he has been deprived of his liberty from that moment and an assault on him may constitute torture. However, it remains essential that the victim be under the physical control of the authorities, who then abuse the power assigned to them or vested in them to carry out an assault on his person.

19. The following observations may be made in respect of Section 2 of the Act implementing the Convention on Torture.

It follows from Article 1 of the Convention that the official capacity of the offender is an essential precondition for the offence when it comes to the instigation of, acquiescence in or consent to torture. However, the person who actually carries out the act of torture need not himself be acting in such a capacity. The first part of Section 2 implements the obligation arising from the Convention to make it a criminal offence for a public official to instigate or acquiesce in acts of torture. The second part is aimed at those who although they do not themselves have the status of public officials or persons acting in another official capacity, are incited by a public official to commit acts of torture or commit such acts with the acquiescence or consent of such an official.

The following should be noted in connection with the role of the police in such cases:

(a) Code of Police Conduct (Bulletin of Acts, Orders and Decrees 1988, no. 577)

On 20 December 1988, the Act of 14 December 1988 partially amending the Police Act (Bulletin of Acts, Orders and Decrees no. 576) and the accompanying Code of Police Conduct came into force. Section 33a of the amending Act (see Annex II for text) establishes the powers of the police to use force under certain circumstances and to search persons in the interests of safety. Until the Act was passed, there had been no statutory basis for these powers. They

are set forth in detail in the Code of Police Conduct (Annex III), which is based on Section 34 of the amending Act. As a result of the establishment of a central code, the codes previously drawn up by the burgomasters of the municipalities with a municipal police force, the National Police Code of Conduct and the Guidelines for Municipal Police Officers on Secondment have now lapsed.

The sections of the Code of Police Conduct relevant here are:

(i) Use of force by the police (Articles 2 to 8);

(ii) Searches in the interests of safety (Articles 9 and 10);

(iii) Care of intoxicated persons (Article 11).

The Minister for Home Affairs issued guidelines to the burgomasters of municipalities with a police force regarding the care of intoxicated persons in a circular (EA/U2820) on 21 October 1987. These are intended to guide police officers in situations where they come into contact in any way at all with persons who appear to require medical help. They refer to situations occurring both within the police station and outside (on the street, in people's homes etc.).

(b) National Ombudsman Act/Police Complaints Regulations

Anyone who has a complaint concerning the actions of a Government agency, including the police, may, pursuant to the National Ombudsman Act, submit a request to the National Ombudsman to investigate the matter. The latter draws up a report giving his opinion regarding the propriety of the actions in question. He may also suggest certain measures to the body involved. The Ombudsman makes an annual report to Parliament and the Ministers on his activities which is published. The report for 1988 reveals that a number of complaints received by the Ombudsman referred to large-scale police operations, searches in the interests of safety and the conditions under which people are held in police cells. In one case the complainant, who had been arrested on account of being drunk in a public place, claimed to have been locked up for 17 hours in a cell intended for drunks without food, water, sanitary facilities or supervision. The Ombudsman's inquiry led to improvements in the system warning police officers that detainees require attention. Report no. 88/863 decided that the complainant had not been treated properly and agreed with the measures taken.

As regards the investigation of complaints against the police, it is important to bear in mind the demarcation which exists between the field of competence of the Ombudsman and the police's own powers of investigation under their internal complaints procedures. There are diverse internal procedures for the handling of complaints, particularly in the larger municipal forces, and the National Ombudsman Act requires that complaints be initially dealt with by the police themselves. A Bill to amend the Police Act with regard to the handling of complaints concerning police officers and members of the Royal Dutch Military Constabulary has been introduced in Parliament. Its aim is to create a uniform and therefore more accessible procedure for complaints against the police which will replace all the local procedures.

(c) Criminal Code

According to the provisions of Article 44 of the Criminal Code, the fact of being a police officer (or other public servant) is regarded as an aggravating circumstance in cases where the person concerned abuses the power, opportunity or means conferred on him by his office in order to commit an offence. In such cases, the penalty (excluding fines) may be increased by one third.

(d) The 1975 National Police Regulations and the 1958 Municipal Police Regulations

Both of the above contain a number of disciplinary measures, of which the following are relevant here:

(i) The imposition of a disciplinary punishment when obligations are not fulfilled or for dereliction of duty (Article 103 ff, National Police Regulations and Article 104 ff, Municipal Police Regulations);

(ii) Suspension by the competent authorities if:

(a) Criminal proceedings have been instituted against a police officer;

(b) The competent authorities have informed the officer that they intend to dismiss him unconditionally or have already done so;

(c) In the view of the competent authorities, suspension is required in the interests of the police force (Article 111, National Police Regulations and Article 112, Municipal Force Regulations); and

(iii) Dismissal by the competent authorities on the grounds that the officer has received a custodial sentence for a criminal offence which has now become irrevocable (Article 120, para. 1 (d), National Police Regulations and Article 121, para. 1 (d), Municipal Police Regulations).

B. Obligations arising from other international agreements

20. The Kingdom of the Netherlands is a party to the following agreement containing provisions regarding torture:

(a) The International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant;

(b) The four Geneva Conventions of 1949 concerning the protection of victims of armed conflict;

(c) The two Additional Protocols of 1977 to the Geneva Conventions;

(d) The European Convention for the Protection of Human Rights and Fundamental Freedoms;

(e) The Sixth Protocol to the Convention listed at (d) relating to the abolition of the death penalty;

(f) The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The Netherlands has ratified the above Convention. Under Article 2, the Committee established by the Convention is permitted to visit places where persons are detained pursuant to a decision of a court or where persons are held who have legitimately been deprived of their liberty by the public authorities.

C. Relationship between the Convention and the national legislation

21. According to the Dutch Constitution, international treaties may be directly applicable in the Netherlands. Article 93 reads as follows:

> "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published."

However, treaty provisions which stipulate that certain acts must be regarded as criminal offences and require that offenders must be prosecuted under the national criminal law cannot be directly applicable.

In the first place, Article 1 of the Criminal Code states that an act can only be deemed to be an offence on the basis of a previously established statutory provision in the criminal law. This means that definitions of offences contained in international agreements have to be incorporated into Dutch criminal law.

In the second place, incorporation into Dutch criminal law also serves to determine the maximum penalty which may be imposed for the offence and the restrictions in the applicability of the criminal law with regard to time and place for that offence and to classify the offence in statutory terms so that it becomes clear which court is competent to hear such cases.

22. There are, however, provisions in the Convention, notably those conferring particular rights or protection on individuals, which can be directly applied and require no further steps to incorporate them in national legislation. These include Articles 3, 13 (second sentence), 15 and 22, in so far as the latter relates to the right of individuals to submit communications to the Committee against Torture.

23. For the application of other provisions of the Convention, recourse can be had to instruments already provided for in Dutch legislation or Dutch law. This applies in particular to the application of Articles 9, 12, 13 (first sentence) and 14, which required no amendment of Dutch legislation.

D. Judicial authorities

24. There is no specialized court in the Netherlands which has particular responsibility for trying cases which come under the scope of the Convention. Legal questions regarding the interpretation of the Convention can be dealt with by the existing competent judicial authorities in the fields of criminal, civil and administrative law. This point will be dealt with in greater detail below.

## E. Legal remedies

25. This general section will be confined to an indication of the legal remedies which offer alleged victims of torture direct access to the independent domestic courts. In Part Two, which discusses the Articles in turn, information will be provided about the other remedies available, notably in connection with Article 13.

26. The Act implementing the Convention on Torture contains a separate definition of the offence of torture. Under Dutch law, the power to institute criminal proceedings lies solely with the Public Prosecutions Department. The individual citizen is not entitled to institute such proceedings, although he/she may lodge a complaint with the Department accompanied by a request that it institute proceedings. Once proceedings have been initiated, the victim can then be joined in proceedings with a view to obtaining compensation. Compensation is also awarded for non-material damage.

27. Dutch criminal procedure is governed by what is known as the expediency principle, which means that the Public Prosecutions Department may decide not to prosecute in a particular case for reasons of public interest. However, under Article 12 ff. of the Code of Criminal Procedure, any interested party may lodge a complaint with the court of appeal against such a decision. The term "interested party" also includes any legal person which through its aims and activities furthers an interest which is directly affected by the decision not to prosecute or to drop proceedings. After having heard, or at least summoned, the complainant, the suspect and the Public Prosecutions Department, the court of appeal may order that proceedings be instituted or continued.

28. According to Article 1401 of the Civil Code, anyone who commits a tort which causes another to suffer damage or loss is obliged to compensate the victim for such losses. Proceedings may be instituted before a civil court to obtain such compensation. Those liable for damages include not only the actual perpetrator of the act causing damage, but also those responsible for the person or persons who caused the damage or loss (Article 1403, Civil Code). According to Article 1407 and related case law, the latter also include non-material losses, caused by deliberate or careless injury to or mutilation of any part of the body, or by an offence against the person. If the victim dies, his/her heirs are entitled to compensation for loss of income. They are not entitled to compensation for non-material losses arising from the death of the victim.

The New Civil Code, which is planned to come into force in 1992, contains similar provisions.

## F. General conclusions

29. The greatest difficulty for those drafting the legislation implementing the Convention was that of formulating a suitable definition of the offence of torture. In a number of respects the definition contained in Article 1 of the Convention does not satisfy the requirements imposed by Dutch legislation on the formulation of definitions of offences. On the one hand, it employs terms which depart from those customarily used in Dutch criminal law without there being any inherent legal justification for the introduction of different terms in the Dutch system. On the other hand, it uses open-ended or vague phrases

which fail to meet the fundamental requirement that offences must be defined as accurately and precisely as possible. Furthermore, it has to be acknowledged that the obligation to establish far-reaching extraterritorial jurisdiction for the offence has certain consequences for the meaning of the term "public official".

Another problem arose from the obligation to establish universal jurisdiction. The Netherlands has traditionally adopted a very cautious standpoint on this issue and believes that on the whole the interests of the international legal order are better served by a commitment to close international co-operation than by the imposition of competing unilateral national claims to jurisdiction, particularly if the latter are not accompanied by an obligation to recognize final judgements passed in other States in respect of the same offences (the ne bis in idem principle).

Section A of Part One of this report describes how the Netherlands has attempted to deal with these problems.

## Part two: Information in relation to each of the articles in Part I of the Convention

### Article 2

30. For legislative, administrative and judicial measures against torture already introduced in the Dutch legal system, see the first part of this report.

31. As stated in paragraph 20, the Kindgom of the Netherlands is a party to the 1949 Geneva Conventions concerning the protection of war victims. The Criminal Law in Wartime Act was passed in 1952 to implement these Conventions. Section 8 of the Act makes it an offence to violate the laws and customs of war. Such offences may be aggravated if they:

(a) Involve inhuman treatment;

(b) Consist of forcing another person to perform certain acts, not to perform them or to tolerate their performance by another;

(c) Result in death or serious physical injury;

(d) Involve the use of violence by a number of people acting together;

(e) Are an expression of a policy of systematic terrorization or unlawful action against the population as a whole or a particular section thereof.

In the Act, the term "war" is taken to include civil war.

With regard to the offences referred to in Section 8, the Act provides for universal jurisdiction. It also excludes the said offences from the application of Articles 42 and 43 of the Criminal Code (which grant immunity from criminal liability where acts are carried out on official orders or according to statutory provisions).

Criminal law in wartime includes a prohibition on torture which, as far as international armed conflict is concerned, derives from Articles 12 and 50 of the First Geneva Convention of 1949, Articles 12 and 51 of the Second Convention, Articles 17, 87 and 130 of the Third Convention and Articles 32, 100, 118 and 147 of the Fourth Convention, as well as from Articles 11, 75 and 85 of Protocol I of 1977 to the Conventions. As far as internal armed conflict is concerned, the prohibition derives from Article 3, common to the four Conventions of 1949 and from Article 4 of Protocol II of 1977 to the Conventions.

Section 1 of the Criminal Law in Wartime Act lists the offences committed in wartime or which only become criminal offences in wartime to which the Act is applicable. This implies that the special court provided for by the Act is competent to hear such cases to which special procedures will apply. Pursuant to section 8 of the Act implementing the Convention on Torture, an explicit reference to sections 1 and 2 of the said Act has been included in the Criminal Law in Wartime Act, thus complying with the obligation contained in Article 2, paragraph 2, of the Convention.

32. Section 3 of the Act implementing the Convention on Torture stipulates that Articles 42 and 43 of the Criminal Code are not applicable to the offence of torture. These Articles read as follows:

"Article 42

A person who commits an offence in order to implement a statutory provision shall not be liable to punishment.

Article 43

1. A person who commits an offence in order to obey an official order given by an authority competent to do so shall not be liable to punishment.

2. A subordinate who obeys an official order given without the competence to do so shall be liable to punishment unless he believed in good faith that the person giving the order was competent to do so and unless obedience to the order lay within the sphere of his duties as a subordinate."

The grounds for making Article 42 inapplicable are as follows:

Although it is hardly conceivable that any Dutch statutory provision could be invoked to justify an act of torture, it should be remembered that in view of the far-reaching form of extraterritorial jurisdiction to which this offence is subject, foreign statutory provisions might also be used as justification.

The possibility of invoking the grounds for immunity from criminal liability provided for in Articles 40 (force majeure) and 41 (exceeding the bounds of self-defence in the heat of the moment) has been explicitly retained. Article 2, paragraph 3, of the Convention states that an order from a superior officer may not in itself be invoked as justification.

Nevertheless, a subordinate who is forced under threat of physical violence to torture another person must be able to invoke force majeure and in such a case be considered not liable to punishment.

It has already been explained in paragraph 31 that under the Criminal Law in Wartime Act, statutory provisions and official orders may not be invoked as grounds for immunity from criminal liability in cases involving the violation of the laws and customs of war.

## Article 3

33. The Dutch legal framework with regard to the matters governed by Article 3 of the Convention is as follows:

### Return/Refoulement

Dutch policy on aliens permits the admission of aliens who cannot reasonably be expected to return to the country whose nationality they possess, provided that they have submitted sufficient evidence to show that they will be mistreated there. This grounds for admission derives from Article 3 of the European Convention on Human Rights and covers all cases to which Article 3, paragraph 1 of the present Convention refers. Such aliens, however, will not be admitted if they come from a country where they enjoyed adequate protection against refoulement and where they can stay under circumstances which in that country are not deemed to be abnormal. In such cases, there can be no danger of torture as defined here.

It should be pointed out that a large proportion of the aliens covered by Article 3 of the Convention may also be deemed to be refugees. Section 15 of the Aliens Act stipulates in this connection that aliens who come from a country where they have good reason to fear persecution on account of their religion, political convictions, nationality, race or because they belong to a particular social group, may be admitted as refugees.

Aliens applying for admission to the Netherlands are in principle entitled to await the decision at first instance on their case in this country. If their application is dismissed, they may request a review, after which it is also possible to appeal to the independent administrative tribunals. The question of whether they may remain in the Netherlands pending the review and appeal decision depends in general on whether their review/appeal is considered to have a reasonable chance of success. Once the Dutch Government has decided to expel the alien, he/she may lodge an appeal before the civil courts on the grounds of a potential tort on the part of the authorities. In most cases, aliens may await the results of this procedure in the Netherlands. Aliens who have previously obtained a residence permit, the validity of which has however expired, may have recourse to the legal remedies described above. However, they may in all cases await the review decision in the Netherlands and often the result of the appeal to the administrative tribunal.

### Extradition

Extradition procedures are laid down in the Extradition Act. The District Courts decide on the admissibility of a request for extradition and appeal in cassation can be made to the Supreme Court. Once a request has been

declared admissible, the Minister of Justice decides on whether it is appropriate to grant the request, bearing in mind the various international agreements which may be applicable.

Section 10, subsection 1 of the Extradition Act states that extradition will not be allowed in cases where in the opinion of the Minister there are grounds for suspecting that if the person concerned is extradited he/she will be persecuted, punished or will suffer in some other way on account of his/her religious or political convictions, nationality, race or the social group to which he/she belongs. Most of the extradition treaties to which the Netherlands is a party contain a similar provision.

An appeal may be lodged before the civil courts against an extradition order issued by the Minister, in the form of an application for an interlocutory injunction. Extradition does not usually take place until the application has been decided upon.

The Netherlands Government has expressed very clearly its view that the principle of non-refoulement contained in Article 33 of the Geneva Convention relating to the status of refugees also refers to refoulement in the form of extradition and can therefore affect obligations arising from existing extradition treaties.

As stated in paragraph 22, the provisions of Article 3 of the Convention are directly applicable, where necessary as a supplement to existing extradition treaties.

34. In practice, the Netherlands Government has been extremely cautious in cases involving expulsion to countries where serious violations of human rights take place. One example is the policy pursued by the Netherlands Government with regarded to Iran.

35. The Dutch Constitution stipulates that extradition may only take place pursuant to an international agreement. The reason for this is that in principle extradition treaties should only be entered into with countries in the quality of whose criminal justice system the Netherlands has reasonable confidence. The number of countries with which the Kingdom of the Netherlands has concluded an extradition treaty is therefore relatively small, and many of them are Western countries. This may explain why in recent decades no decision to refuse extradition has been taken in cases where the fear or risk of being subjected to torture or other inhuman treatment has been invoked. In cases where this has led to complaints being lodged with the European Commission of Human Rights on the grounds of Article 3 of the European Convention on Human Rights, in each instance the complaint has been declared inadmissible.

## Article 4

36. The following observations are intended to supplement the considerations outlined in Part I A of this report.

The fact that the attempt to commit a criminal offence and acts constituting complicity or participation in offences are also criminal offences derives from Articles 45, 47 and 48 of the Criminal Code. Article 45 states that an attempt to commit an offence is itself an offence if the

offender's intention has been revealed by his starting to carry it out and if completion of the act was prevented purely by circumstances independent of his will.

Article 47 states that those who commit a particular offence, cause it to be committed, participate in or instigate its commission will be deemed to be guilty of the offence and punished accordingly.

Article 48 states that those who intentionally aid in the commission of a criminal offence or intentionally provide the opportunity, means or information which aids the commission of the offence will be deemed to be guilty of complicity and punished accordingly.

37. The penalties for torture are among the harshest provided for by Dutch legislation. The death penalty has been abolished, even during wartime. The most severe sentence is life imprisonment; if a determinate prison sentence is imposed, it must not exceed 20 years.

38. There have been no prosecutions in the Netherlands for acts of torture committed since the Second World War.

## Article 5

39. Criminal jurisdiction, as referred to in Article 5 of the Convention, derives for the Netherlands from the following statutory provisions:

(a) Articles 2 and 3 of the Criminal Code. Article 2 reads: "Dutch criminal law shall be applicable to any person who commits a criminal offence in the Netherlands". Article 3 reads: "Dutch criminal law shall be applicable to any person who commits a criminal offence outside the Netherlands on board a Dutch ship or aircraft".

(b) Article 5, paragraph 1 (2) of the Criminal Code, which reads: "Dutch criminal law shall be applicable to any Dutch national who:

(1) ...

(2) perpetrates an act outside the Netherlands deemed under Dutch criminal law to be an indictable offence and which also constitutes a criminal offence in the country in which it is committed."

It is contrary to Dutch legal tradition to establish criminal jurisdiction on the basis of the nationality of the victim. The provisions of Article 5, paragraph 1 (c) of the Convention have therefore not been implemented.

Nevertheless, in order to implement the second paragraph of Article 5, universal jurisdiction has been established over the criminal offence of torture in Section 5 of the Act implementing the Convention on Torture, which reads:

"Dutch criminal law shall apply to any person who commits outside the Netherlands one of the criminal offences described in Sections 1 and 2 of this Act."

40. The obligation imposed by the Convention on the signatories to establish universal criminal jurisdiction over the criminal offence of torture was not accepted without criticism by the Netherlands. The following observations on this point are to be found in the Parliamentary papers:

"Special attention should be paid to the obligation arising from the Convention to establish universal criminal jurisdiction and to the way in which it is suggested this obligation should be fulfilled. It should first of all be stated that the reasons for imposing an obligation to establish such a far-reaching form of extraterritorial jurisdiction for torture are not obvious ones.

"The criminal offence of torture is not intrinsically one which tends to involve more than one country. On the contrary, cases having an international aspect, either because offender and victim possess different nationalities, or because the offender has fled abroad or even because the criminal offence has had tangible effects on the territory of another State, are highly exceptional. Experience shows that it is much more typical for offender and victim to be of the same nationality, for the criminal offence to take place on the territory of the State whose nationality they possess and for the offender to have little reason to flee the country as long as he feels he is supported by his social or political environment.

"Furthermore, many instances of torture occur in secrecy, that is to say, in the absence of incidental witnesses, and it may therefore be extremely difficult for a third State which has detained a suspected torturer and has acquired the competence to try him, to obtain the necessary evidence to ensure a successful prosecution, particularly in cases where no co-operation may be expected from the State where the criminal offence took place in providing such evidence under the terms of a mutual legal assistance agreement.

"Viewed in this light, the basic conditions which would justify the establishment of universal jurisdiction (i.e. over offences committed by foreign nationals outside the Netherlands) are lacking. Only rarely, in fact, will multinational features be inherent in the offence and will the required international solidarity and common interest exist between the States most involved. The mere fact that torture is an extremely serious offence which arouses great indignation and concern is not in itself sufficient justification for subjecting it to universal jurisdiction. This, at any event, is the traditional Dutch standpoint on this issue.

"In this context, the basic principle to which we should continue to adhere is that the suppression of such practices is the responsibility of the States whose demonstrable connection with the offence in question constitutes grounds for the exercise of jurisdiction. Where such States are deemed by other States to be failing to exercise their jurisdiction sufficiently, this can easily create the temptation to intervene in the affairs of that State and can even lead to a political conflict, and the criminal law is hardly the most appropriate instrument for tackling political differences.

"The reasons for deciding to honour the obligation despite the above considerations are twofold. In the first place, the social and political situation in a country where torture has been practised can always change dramatically, which would immediately lead to two of the necessary conditions (readiness to co-operate and a shared code of values) being fulfilled. History reveals a sufficient number of examples of authoritarian régimes which have reformed or have returned to democratic principles, and which have legitimized themselves by a determined endeavour to settle with the past. During this process of legitimization, support drawn from evidence that other countries share the same values (since their legislation shows that they too condemn behaviour once practised but now forsworn) can strengthen the domestic situation of the new régime. Even in this situation, it would be preferable for a suspect to be prosecuted in the State in which the offence took place and not in a random third State. However, it is possible that the suspect will not be extradited (for example, if there is a possibility of the death penalty being imposed and no undertaking can be given that if it is imposed, it will not be carried out, or if the suspect would have to be tried by a special tribunal. In such a case, the existence of far-reaching extraterritorial jurisdiction may offer a solution. Nevertheless, in this hypothesis, it would suffice to establish a restricted form of universal jurisdiction subject to the condition that it will be exercised only after the State most closely concerned has made an explicit request to that end or after a request for extradition has been received from that State and refused. It has been proposed that the same restricted form should be used in the implementation of a number of other international agreements which contain a similarly worded obligation to establish far-reaching forms of extraterritorial criminal jurisdiction. These comprise the New York Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the New York Convention of 17 December 1979 against the Taking of Hostages, and the New York/Vienna Convention of 3 March 1980 on the Physical Protection of Nuclear Material.

"The reason why it is not now being proposed to implement the Act implementing the Convention on Torture in exactly the same way, that is to say, by means of an addition to Article 552h of the Code of Criminal Procedure, to be read in conjunction with Article 4a of the Criminal Code, lies in the second ground on the basis of which the establishment of universal jurisdiction could be accepted. This rests on the intolerable nature of the idea that as long as torturers are protected by the régime in their own country, they may travel freely and may, with impunity, come face to face with their victims who have fled to other countries.

"In this hypothesis, the exercise of extraterritorial jurisdiction is not to be construed as a means of acting on behalf of another, more closely concerned State. On the contrary, the prosecution of a public official representing that State for acts which he performed there with the approval or acquiescence of his superiors, will be seen in essence as amounting to the prosecution and condemnation of the régime as a whole. In this way the administration of criminal justice goes far beyond the boundaries of a specific case to become an instrument in an international political conflict. There are thus very powerful objections to such a use of the Dutch criminal justice system. However, understandable

scepticism concerning the effectiveness and credibility of criminal judgements in connection with a conflict in the international political arena, stands in opposition to the sense of justice of Dutch society ruled by law, which should find its purest expression in the judgements of the courts. A veritable shock wave would go through the Dutch legal order if, faced with the presence in this country of a foreign national recognized as a torturer by witnesses and victims, the courts were to declare themselves incompetent to hear the case.

"Although the justification for the establishment of universal jurisdiction for the offence of torture can be found in the above, this in no way detracts from the fact that the Convention would not have fulfilled its aims if it had not also provided for other, more effective mechanisms for the regulation of international conflicts which are, after all, inherent in international concern and involvement in the observance of basic human rights. Indeed, it cannot be said that the drafters of the Convention ignored other mechanisms, as witness the detailed provisions concerning the Committee against Torture and the powers conferred on it.

"Of course, it will be necessary to wait and see on the one hand which States and how many make use of the opportunity offered by Article 28 to declare that they do not recognize the competence of the Committee to make inquiries on its own initiative, and on the other hand which States and how many recognize the competence of the Committee to institute inquiries on receipt of a complaint either from one of the Parties to the Convention or from individuals subject to a Party's jurisdiction. Nevertheless, it is essential, also in the eyes of the drafters of the Convention, that the application of domestic and international criminal law is not seen as the only method of combating torture. Within the context of international relations, there are other methods which are just as effective, if not more so. These include publicity generated by a free press, confidential talks at government level, the activities of the special rapporteurs appointed by the United Nations, open criticism in United Nations forums and other means of exerting political pressure."

## Article 6

41. In view of the penalties laid down for the offence of torture, it may be deemed to be an offence for which Dutch law allows pre-trial detention. This may be imposed under the following circumstances:

(a) If the suspect has no fixed address or place of residence in the Netherlands and the offence of which he/she is suspected is one for which a custodial sentence may be imposed;

(b) If the maximum sentence laid down for the offence in question is four years or more.

42. Section 13 of the Dutch Extradition Act lays down that, in specified cases, at the request of the competent authorities of another State, an order for the provisional arrest of a foreign national in the Netherlands may be made if there is good reason to expect that a request for his extradition which is capable of being granted will shortly be made by that State.

43. Pre-trial detention (as described in para. 41) or provisional arrest for the purposes of extradition (as described in para. 42) may be suspended subject to certain conditions, which may serve to guarantee the availability of the person concerned.

44. The Kingdom of the Netherlands is a party to the Vienna Convention on Consular Relations. In accordance with Article 36 of the Convention, the consular representatives of an alien who has been provisionally arrested will, at his request, be informed of his arrest and afforded the opportunity to enter freely into contact with him and to safeguard his interests.

45. The obligation to notify certain other parties to the Convention of a remand in custody and to report on the results of preliminary inquiries will be fulfilled in so far as this does not conflict with other obligations arising from international agreements, notably those arising from the International Covenant on Civil and Political Rights (Art. 17) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 8) concerning the protection of privacy.

## Article 7

46. This Article requires that in certain cases the jurisdiction established pursuant to Article 5 be applied. It is formulated in such a way that a fundamental principle of Dutch criminal law, that of the Public Prosecutor's powers of discretion as to whether to prosecute or not, remains unaffected.

47. It should be pointed out that in contrast to similar provisions in earlier Conventions in which the rule aut dedere aut judicare is embodied, Article 7 creates an international obligation to hand over a suspect to the competent authorities for the purposes of prosecution if in the cases referred to in Article 5 the person concerned is not extradited. Article 5, paragraph 2 refers only to cases of non-extradition to other parties to the Convention and furthermore, only the parties referred to in the first paragraph. This implies that a decision not to extradite a suspect to a third State which is not a party to the Convention would not create the international obligation embodied in Article 7. It also means that it is only after an extradition request has been received that it can be determined whether the request comes from another party to the Convention or from a third State and only then can it be decided whether the decision not to extradite would give rise to the international obligation embodied in Article 7. None of this of course affects the power of the parties to institute proceedings on the basis of their national legislation, whether a request for extradition has been made or not. Under the Act implementing the Convention (sect. 5), an investigation may in principle always be instituted regardless of whether a decision regarding extradition has previously been taken or not.

48. Those suspected of having committed the offence of torture will not be prosecuted or tried any differently from those suspected of other criminal offences. There are no special rules of procedure laid down with regard to the furnishing of evidence or the position of the suspect.

## Article 8

49. Article 2, paragraph 3 of the Dutch Constitution reads:

> "Extradition may only take place pursuant to a treaty. Further regulations concerning extradition shall be laid down by Act of Parliament."

This means that the Kingdom of the Netherlands belongs to the group of countries referred to in Article 8, paragraph 2.

50. Most of the extradition treaties to which the Netherlands is a party apply what is known as the "elimination system" whereby in principle all offences for which a custodial sentence of a certain length (usually one year or more) may be imposed in both the requesting State and the requested State constitute extraditable offences. There are certain exceptions, such as military, political and sometimes tax offences. In the case of these treaties therefore, the offence of torture is ipso facto included. Future treaties will, it is assumed, conform to the above model.

The Netherlands is still bound by a limited number of older bilateral treaties which apply what is known as the "enumeration system" whereby offences for which extradition may be requested are listed by name. The legal fiction contained in the first sentence of Article 8, paragraph 1 is directly applicable in connection with the countries with which the Netherlands has concluded such a treaty, provided that they are also parties to the Convention.

51. As is the case with other treaties which include a provision similar to Article 8, the Netherlands regards such provisions as the basis required by the Constitution for extradition to other parties to the Convention. However, this does not mean that this provision of the Convention has the same binding force under international law as existing extradition treaties. The recognition of Article 8, paragraph 2 as the required legal basis for extradition in this respect puts the Netherlands in the same position as parties to the Convention which do not make extradition conditional on the existence of a treaty and therefore come under the scope of paragraph 3 of Article 8.

52. The 1949 Geneva Conventions on the protection of the victims of armed conflict provide for a separate system for the surrendering of persons suspected of serious breaches of the Conventions (see Articles 49/I, 50/II, 129/III and 146/IV). The 1954 War Crimes (Surrender of Suspects) Act was passed in order to implement these provisions and regulates surrender procedures in relation to other parties to the Geneva Conventions in cases involving serious breaches of the Conventions, including torture.

53. This provision is implemented in the Netherlands in the following way. Section 8 of the Act implementing the Convention on Torture contains an addition to Section 51a of the Extradition Act consisting of a reference to Sections 1 and 2 of the Act implementing the Convention on Torture. Section 51a of the Extradition Act reads as follows:

"Section 51a. 1. As regards the offences referred to in subsection 2 which are to be defined as criminal offences pursuant to the treaties referred to in the said subsection, suspects may be extradited to States party to the relevant treaty.

"2. Subsection 1 refers to:

- the criminal offence referred to in Article 385a of the Criminal Code, in so far as it falls within the definitions of the Hague Convention of 16 December 1970 for the suppression of the unlawful seizure of aircraft (Netherlands Treaty Series 1971, 50);

- the offences referred to in Articles 162, 166, 168, 385b and 385c of the Criminal Code, in so far as the offence falls within the definitions of the Montreal Convention of 23 September 1971 for the suppression of unlawful acts against the safety of civil aviation (Netherlands Treaty Series 1971, 218);

- the offences referred to in Section 10, subsections 2, 3, 4 and 5, Section 10a, subsection 1 and Section 11, subsections 2 and 3 of the Opium Act, in so far as the offence falls within the definitions of Article 36, paragraph 1 of the 1961 Single Convention on Narcotic Drugs as amended by Article 14 of the Protocol amending the Single Convention established on 25 March 1972 at Geneva (Netherlands Treaty Series 1980, 184);

- the offences referred to in Articles 92, 108-110, 115-117b and 285 of the Criminal Code, in so far as the offence has been committed against an internationally protected person or his protected goods and the offence falls within the definitions of the New York Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (Netherlands Treaty Series 1981, 69);

- the offence referred to in Article 282a of the Criminal Code, in so far as the offence falls within the definition of the International Convention against the Taking of Hostages, concluded at New York on 17 December 1979 (Netherlands Treaty Series 1981, 53);

- the offences referred to in Sections 1 and 2 of the Act implementing the Convention on Torture, in so far as the offence falls within the definition of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded at New York on 10 December 1984 (Netherlands Treaty Series, 1985, 69).

"3. Extradition by virtue of subsection 1 shall take place subject to the provisions of this Act and furthermore - in so far as no other extradition treaty applies - to the provisions of the European Convention on Extradition of 13 December 1957 (Netherlands Treaty Series, 1965, 9)."

Section 9 of the Act implementing the Convention on Torture provides for an addition to the War Crimes (Surrender of Suspects) Act, of which Section 1 now reads:

"Section 1. Without prejudice to the provisions of treaties relating to the extradition of aliens concluded with other States, aliens may be surrendered to other States for the purposes of prosecution for one of the offences referred to in Sections 8 and 9 of the Criminal Law in Wartime Act, Sections 1 and 2 of the Act implementing the Convention on Genocide or Sections 1 and 2 of the Act implementing the Convention on Torture, provided that the offence constitutes a serious breach of one of the following Geneva Conventions of 12 August 1949:

(a) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;

(b) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea;

(c) the Convention relative to the Treatment of Prisoners of War;

(d) the Convention relative to the Protection of Civilian Persons in Time of War;

or of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 12 December 1977."

54. Paragraph 4 of Article 8 has no significance for Dutch law. The Dutch Extradition Act contains no provisions limiting the possibility of extradition in connection with the place where the offence for which extradition is being requested was committed.

## Article 9

55. Chapter X of Book Four of the Dutch Code of Criminal Procedure contains provisions relating to international legal assistance in criminal matters (Articles 552h-552s). By virtue of these provisions, legal assistance may be afforded to other States. Unlike in the case of extradition, there is in principle no requirement that the provision of such assistance be based on a treaty. Article 552k stipulates that:

1. Where a request for legal assistance is based on a treaty, it shall be granted as far as possible;

2. In cases where a reasonable request which is not based on a treaty is concerned, and in cases where the relevant treaty does not oblige the Netherlands to grant such a request, the request shall be granted, provided that this does not conflict with a statutory regulation or with instructions from the Minister of Justice.

In cases where the granting of a request would involve the use of coercive measures, Article 552n stipulates that the request may only be granted if it is based on a treaty. Such a basis is provided in this context by Article 9 of the Convention.

56. Article 552m, paragraph 1 of the Code of Criminal Procedure states that requests for legal assistance in cases where criminal offences of a political nature or related offences are being investigated may only be granted with the authorization of the Minister of Justice. Such authorization may only be given for requests made on the basis of a treaty and only after consultation with the Minister for Foreign Affairs. The authorities of the requesting State should be informed of the decision whether or not to accede to the request via diplomatic channels.

57. The Netherlands is a party to a number of treaties relating to mutual assistance in criminal matters. These are the relevant Council of Europe and Benelux Conventions and a bilateral agreement with the United States. New bilateral agreements have recently been concluded with Australia and Canada.

Article 10

58. During the training of police and prison officers particular attention is paid to the humane treatment of suspects and detainees. Much time is devoted to acquainting such personnel with the laws and regulations governing their work. Considerable attention is given to the issue of human rights and their protection in education.

Article 11

59. Prison regulations are periodically reviewed and further provision for ensuring respect for basic rights is made where appropriate. Circulars to prison governors are reviewed every four years in connection with regulations.

Article 12

60. If it is suspected that an act of torture has been committed by a person who is not a member of the Dutch police force, i.e. the body charged with the investigation of criminal offences, criminal investigations into the offence will be instituted by the police, under the authority of the Public Prosecutions Department. Investigations are usually initiated as the result of a tip-off or an information laid by a member of the public.

61. If it is suspected that an act of torture has been committed by a member of the Dutch police force, criminal investigations will be instituted by the National Criminal Investigation Department, which is specifically concerned with the investigation of offences committed by police officers. The Department works on the instructions and under the authority of the competent Procurator General at the Court of Appeal.

62. As stated in paragraph 26, under Dutch law the Public Prosecutions Department has the exclusive right to institute criminal proceedings. It also decides whether in specific cases proceedings should be initiated or pursued. Although it forms part of the judiciary, the Public Prosecutions Department is not entirely independent. Section 5 of the Judiciary (Organization) Act reads:

> "Officials of the Public Prosecutions Department shall be obliged to obey the instructions given to them in their official capacity by the competent authorities acting on behalf of the King (i.e. the Government)."

This means that the Department may be instructed to investigate certain matters and to prosecute suspects who may be involved in them. This provision provides a basis for the implementation of Article 7, paragraph 1 of the Convention.

63. In cases where criminal investigations require that certain special investigation procedures be carried out, such as the summoning of witnesses for examination, the carrying out of house searches or the application of other coercive measures, a preliminary judicial examination will be initiated by the Examining Magistrate on the instructions of the Public Prosecutor. The Examining Magistrate is a member of the judiciary and is independent and impartial. His duty is to prepare the case for the hearing before the court. He does not himself take part in that hearing. A preliminary judicial examination can be opened before the identity of the suspect is known.

64. The requirement contained in Article 12 of the Convention, that a "prompt investigation" be carried out, is guaranteed by the obligation deriving from Article 6, paragraph 1 of the European Convention on Human Rights, which states that "In the determination ... of any criminal charge against him, everyone is entitled to a ... public hearing within a reasonable time ... ." Under Dutch law this obligation is directly applicable, and it has been interpreted in case law in such a way that the police and Public Prosecutions Department are obliged to conduct criminal investigations and bring prosecutions with the greatest possible dispatch, on pain of having the charges dismissed by the courts.

65. It should further be pointed out that no cases are known to have occurred in which there were reasonable grounds for believing that acts of torture had taken place within the Kingdom of the Netherlands.

## Article 13

66. Article 5 of the Dutch Constitution guarantees the right to submit petitions in writing to the competent authorities. Any individual who alleges that he has been subjected to torture in any territory under the jurisdiction of the Kingdom of the Netherlands may complain to the competent authorities in a number of ways. Detainees are free to write and receive letters; communications with the Head of State, the States General (Parliament), the Minister of Justice, the judicial authorities, the Central Council for the Application of Criminal Law and the supervisory or complaints committees at individual prisons are in no way monitored (Articles 91 and 92 of the Prison Rules).

Firstly, such individuals may submit information to the police or the Public Prosecutions Department. Articles 160 ff of the Code of Criminal Procedure regulate the submission of information and lodging of complaints. According to Article 161, anyone who has knowledge of a criminal offence is competent to report it to the police. Under Article 162, public bodies and officials who, during the exercise of their office, learn of offences for whose detection and investigation they are not responsible must report such offences without delay, particularly if the offence has been committed by a public official who has thereby acted in a way contrary to his oath of office, or has employed power, opportunity or means conferred on him by his office. The section dealing with Article 12 describes the actions to which submission of information leads.

Secondly, they may apply to the Petitions Committees of the Upper or Lower House of Parliament. The Committees may themselves institute inquiries which may or may not be held in public. The Committees are also empowered to invite the competent Minister to take specific steps.

Thirdly, complaints may be addressed to the national Ombudsman if the complainant feels that the behaviour of a representative of the authorities has been incorrect. The Ombudsman is empowered to conduct an independent investigation, unless he is of the opinion that the behaviour in question can be dealt with by the statutory administrative tribunals.

Fourthly, there are complaints committees attached to all the larger police forces which consist either entirely or partly of lay persons, to which members of the public can address complaints regarding certain actions of the police. The committees may carry out investigations and make recommendations to the head of the police force, who in the larger forces is the burgomaster of the municipality concerned. The burgomaster in turn is politically answerable to the municipal council, which is an elected body. Where the smaller police forces are concerned, complaints may be addressed to the burgomaster and to the Minister of Home Affairs or the Minister of Justice.

Fifthly, detainees may address complaints to the independent complaints committees attached to prisons.

Sixthly, if all domestic legal remedies have been exhausted, recourse may be had to international bodies which, pursuant to treaties to which the Netherlands is a party, are competent to handle complaints, such as the bodies set up under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

67. The need to protect witnesses and complainants against intimidation resulting from the submission of information or the giving of evidence is specifically recognized in the Netherlands. In practice, the courts try to offer such protection by preserving the anonymity of witnesses who feel they are in danger. This may even result in witnesses only being heard during the preliminary examination which precedes the public hearing, if necessary in the absence of the suspect and his/her counsel and of the Public Prosecutor.

This practice, which is sanctioned by case law, has nevertheless been criticized in the light of the conditions required for a fair trial, notably with regard to the right of the suspect to be confronted with witnesses and to ask them questions (or have questions put to them on his/her behalf). This has led to a complaint being lodged against the Netherlands with the bodies responsible for the international monitoring of the observance of the European Convention on Human Rights. It is expected that the European Court of Human Rights in Strasbourg will pass judgment in this matter at the end of 1989 or the beginning of 1990. It will then be clear to what extent methods used up to now to protect witnesses who have been intimidated or feel intimidated may be retained.

A Bill is now being drafted which would make additions to the Code of Criminal Procedure in order to codify case law to date and to create procedural safeguards against the misuse of anonymity. Drafting has been suspended however, pending the decision of the European Court.

68. A certain degree of police protection will be offered to people who have been threatened or run the risk of reprisals. However, such protection cannot be unlimited, either in terms of duration or in terms of the manpower required. Certain other forms of protection offered in other countries, notably the creation of a new identity for threatened witnesses, would be unacceptable in the Netherlands.

69. It is a criminal offence to make explicit threats. Article 285 of the Criminal Code renders it an offence to threaten a person with, inter alia, any form of homicide, with kidnapping or serious assault.

The Bill referred to in paragraph 67 includes a provision which renders it an offence to communicate with a person who, it can reasonably be assumed, will have to make a statement under oath or a similar statement in his/her capacity as a witness or expert, with the apparent aim of affecting that person's freedom to make a true statement or one which accords with his/her conscience.

## Article 14

70. Dutch law provides for several means by which victims of crimes of violence may obtain compensation.

71. Firstly, a victim may take criminal proceedings as an injured party and make an application for damages against the suspect. The opportunities to do this under existing Dutch legislation are limited. At present, the maximum amount of damages which can be applied for in such proceedings is Fl.1,500. However, a Bill has been introduced in Parliament which aims to remove this restriction. It would also introduce compensation as a separate criminal sanction in the Criminal Code. This means that the criminal courts would be able to order the suspect to pay damages to the victim without the latter having to take part in the proceedings. The criminal courts can at present specify in the case of a wholly or partially suspended sentence that one of the conditions attached to the suspension is the payment of compensation to the victim. However, the power to impose a wholly or partially suspended sentence is restricted to sentences not exceeding three years. The power of the courts to impose such conditions is to be retained.

72. Secondly, attention should be drawn to the 1975 Criminal Injuries Compensation Fund (Provisional Scheme) Act. Payments may be made from the Fund to victims of deliberate crimes of violence committed in the Netherlands if they have suffered serious physical injury. Payments may also be made to their surviving dependants, in the event of the death of the victim.

The Fund is administered by a committee appointed by the Crown. Payments are made on the basis of what is considered reasonable and fair. Victims may lodge an appeal against a decision refusing their application for compensation from the Fund with The Hague Court of Appeal, which has the power to overturn the decision and refer the case back to the committee for review.

73. Thirdly, victims seeking compensation on account of any tort may have recourse to the civil courts. If the tort is alleged to have been committed by the State or by a public official in the exercise of his office, the State may be compelled to pay damages. The relevant provisions in this context are Articles 1401 ff of the Civil Code (see also para. 28).

## Article 15

74. Under Dutch criminal procedure, not all types of evidence are admissible, since the law exhaustively lists those which are (i.e. the judge's own observations, statements made by the suspect, witnesses and experts, and written evidence), while it excludes statements made by fellow suspects and declares uncorroborated statements made by the suspect or a single witness to be insufficient. In Dutch criminal case law the doctrine of unlawfully obtained evidence, i.e. that obtained by a breach of statutory provisions or in a way which conflicts with unwritten procedural law, has been developed. Such evidence may not be used to prove a charge. The relevant provision here is Article 29 of the Code of Criminal Procedure, which reads:

> "1. In all cases in which a suspect is being examined, the magistrate or official conducting the examination shall refrain from any action whose purpose is to induce the suspect to make a statement which cannot be described as being made of the suspect's own free will. The suspect is not obliged to answer questions.
>
> "2. Suspects shall be informed before they are examined that they are not obliged to answer questions.
>
> "3. The statements made by a suspect, particularly those which contain an admission of guilt, shall as far as possible be incorporated in the official report in the suspect's own words. The official report shall also contain a statement to the effect that the suspect has been given the information referred to in paragraph 2."

Failure to observe the above regulations leads to the evidence thus acquired being declared inadmissible.

Witnesses are in principle obliged to make a statement unless they can invoke a statutory exemption. The obligation is compelling: witnesses at a hearing are under oath and, at the request of the suspect or upon application by the Public Prosecutions Department, the courts have the power to remand in custody witnesses who without legitimate grounds refuse to answer the questions put to them or to take the oath (or, in the case of non-believers, make the affirmation), provided this is urgently necessary in the interests of the inquiry.

The court may order an immediate criminal investigation if a witness is suspected of having committed perjury. In no instance is it permissible to subject witnesses to any coercive measures other than those described above.

75. There is as yet relatively little case law on the subject of unlawfully obtained evidence in civil procedure. The literature assumes that evidence obtained through a breach of the law is always inadmissible.

## Article 16

76. Whereas the Netherlands has chosen to formulate a separate definition of the offence of torture, other forms of cruel, inhuman or degrading treatment or punishment may be deemed to fall within the definitions of existing offences in the Criminal Code. These include various forms of assault

(Articles 300-306 of the Code), offences against personal liberty (Articles 274-286), the abandonment of those requiring assistance (Articles 255-260), slander, especially that of a discriminatory nature (Articles 137c-137e) and certain offences against public decency.

Note should also be taken in this connection of Article 44 of the Criminal Code, which reads:

> "If by committing an offence a public servant acts in a way contrary to his oath of office, or thereby abuses the power, opportunity or means conferred on him by his office, the penalty imposed on him for that offence, with the exception of a fine, may be increased by one third."

This is a general provision regarding the increasing of penalties which is valid for all offences in which the possession of the status of public official is not in itself an essential constituent element.

77. The statements made above with respect to Articles 10, 11, 12 and 13 are also applicable to the acts referred to in Article 16 of the Convention.

## II. ARUBA

### Part One: Information of general nature

78. Aruba is part of the Kingdom of the Netherlands, which consists of three autonomous partners: the Netherlands, Netherlands Antilles and Aruba. Prior to 1 January 1986 Aruba formed part of the Netherlands Antilles, but since then it has attained its current autonomous status ("Status Aparte"). Foreign affairs is, in accordance with Section 3 of the Constitution (Statuut) of the Kingdom, a matter of the Kingdom, which is dealt with by the Council of Ministers of the Kingdom. This Council consists of the Council of Ministers of the Netherlands supplied with a Minister Plenipotentiary for both Aruba and the Netherlands Antilles.

79. Treaties or other international agreements with other States and international organizations, which affect the Netherlands Antilles and/or Aruba, have to be concluded in conjunction with their respective Parliaments, whereas treaties which affect only the European territory of the Kingdom can be concluded by an act of the Dutch Parliament alone.

80. The Netherlands Antilles and/or Aruba can also, subsequently, ask for co-validity of a treaty that is concluded by the Kingdom, but only applicable to the Netherlands.

81. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force in the Kingdom on 20 January 1989. A necessary amendment of internal legislation was enacted on 29 September 1988.

82. In addition to the Convention against Torture, the Kingdom has ratified the European Convention on Human Rights (which entered into force in Aruba on 31 December 1955), the International Covenant on Civil and Political Rights (which entered into force in Aruba on 11 March 1979), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (which entered into force in Aruba on 1 February 1989).

83. The term "torture" or "torture or cruel, inhuman or degrading treatment" is not employed as such in Aruban legislation, but from the tenor of various Aruban Laws and Regulations, the prohibition of torture can be inferred. Some examples will be discussed below.

84. Although revised on several occasions, the old Penal Code from 1913 is still effective in Aruba, as well as the Criminal Procedure Act of 1914, which is at the moment in a process of being totally replaced by a new, modern version. The draft Criminal Procedure Act contains several sections aimed at protection of the accused, as, for example, a limitation of the duration of his interrogation, his detention before being interrogated, as well as of his detention before trial.

85. To date no complaint of torture has ever been filed in Aruba. For possible complaints of torture, as well as complaints of cruel, inhuman or degrading treatment or punishment, procedures have been established to ensure a fair and just treatment.

86. Cases of alleged acts of torture are examined by various authorities, depending on whom the alleged offender is. As most complaints would be of policemen in the execution of their duties, several Police Ordinances were introduced in 1988 to secure a proper behaviour by policemen.

87. Act No. 60 of 3 June 1988 limits the power of policemen with regard to the use of force. Policemen are entitled, in the lawful exercise of their functions, to use force against persons and objects, only when the envisaged objective so justifies, and that objective cannot be attained otherwise, and the risk of the use of force is smaller than the disadvantage resulting from not attaining the objective. Act No. 18 (Police Ordinance) of 3 June 1988 contains a similar provision.

88. Act No. 71 of 8 June 1988 refers to complaints against policemen, and provides for the institution of a Complaint Commission. The Commission consists of three to five persons, each being prominent persons of irreproachable character, having sound judgement regarding the relation of the police and the public, as well as regarding the feelings that exist in the Aruban community. The Minister of Justice deals with complaints in the first instance, after which an appeal to the Commission is possible. Unfortunately, to date, the Complaint Commission has not been functioning.

89. Act No. 25, regarding the education of policemen, stipulates that knowledge and understanding of human rights, as well as of the need to protect these rights, should be incorporated at all levels of education of policemen.

90. Policemen should furthermore be educated, among other things, about:

(a) The concept of law;

(b) General police work and regulations concerning correct police behaviour;

(c) Instructions regarding the use of force, and

(d) The concept of criminal offence.

## Part Two: Information in relation to each of the articles in part I of the Convention

### Article 2

91. The legislative measures taken to prevent acts of torture primarily concern protection of the suspect and certain guarantees on his behalf. The Criminal Procedure Act is in the process of being totally replaced. The draft Criminal Procedure Act contains no provision explicitly prohibiting "torture" or "torture or cruel, inhuman, or degrading treatment or punishment", but this prohibition may be inferred from the tenor of the Act in view of the protection offered to the suspect.

92. Several Police Ordinances have been passed, instituting, for example, a Complaint Commission for police action. Reference is made to these Ordinances in paragraphs 87-89. Rules concerning interrogation of suspects of criminal offences are given in the Code of Criminal Procedure and interrogation

instructions to the Police Force. For the treatment of prisoners, rules are presented in the Prison Act of 1930. This Prison Act is being replaced by a new Penitentiary Instruction, which is more in conformity with the Aruban Constitution and all the Treaties concerning human rights which are applicable to Aruba (referred to in paragraph 82).

93. At the moment there is a shortage of prison cells. This unfortunate situation results in convicts spending time in police cells (instead of in prison), where they do not enjoy the same rights as they would in prison (for example: exercise, television, books, work and games). Furthermore, this shortage sometimes means that several prisoners share a cell intended for one prisoner. However, with the construction of the new Correction Institute nearing completion, these problems will soon belong to the past.

## Article 3

94. Regarding the "non-refoulement" principle in this article information shows that although the immigration police usually apply the regulations of the Admission and Expulsion Act very strictly, in cases where there are substantial grounds for believing that the person in question would be in danger of being subjected to torture or threats to his well-being or even his life, if sent to another country, due account is taken of these facts, and the person will not be expelled. According to article 22, paragraph 2, of the Alien Act such a person may not be expelled.

95. Practice shows, however, that due to the fact that regulations are applied so strictly, no account is taken of other circumstances that might influence the decision. Even when a person asks for a judge's decision in a particular case, he must await the outcome of that judgement outside Aruba.

## Article 4

96. Acts of torture are dealt with in the Penal Code, although not explicitly. The central provisions are articles 313 to 319, regarding assault, assault causing severe bodily injury, assault causing death, assault using weapons and wilful assault respectively.

Also relevant are:

(a) Article 295: "Anyone who unlawfully deprives another of his liberty shall be punished with up to seven years and six months imprisonment."

(b) Article 381: "The public official, who by misuse of power, forces another person to do, omit or tolerate something, shall be punished with up to two years imprisonment."

(c) Article 46: "If a public official, by committing an offence, violates a special official duty, or by committing an offence makes use of his power, opportunity or means offered to him by his function, the punishment can be increased by one third."

97. Attempts are covered by a general provision in article 47.

Article 5

98. The territorial application of the Penal Code is regulated in its sections 2 to 8, which apply the principles of universality, territoriality and personality. Violations of the provisions referred to above may be tried by the Aruban or Antillean courts, even when the offence is committed by an Aruban or Antillean citizen abroad, or by anyone on board a ship (or aircraft, Draft Act on Criminal Procedure) registered in Aruba.

Article 6

99. When the public prosecutor has sufficient indications that an offence has been committed, and of the person who has committed it, and he considers a trial necessary, he will offer the documents with a demand to that end to the judge (article 71 Act of Criminal Procedure).

100. Article 38 of the Act of Criminal Procedure states that the public prosecutor can, after having heard the suspect, order in the interest of the inquiry that the suspect remain available for justice and take him into custody.

Articles 7 and 8

101. With regard to the conclusion of extradition treaties, the competence lies with the Government of the Kingdom, as referred to in paragraphs 78 to 80.

Article 9

102. Again, as foreign affairs fall within the competence of the Kingdom, requests concerning assistance in criminal matters have to be made to the Kingdom Authorities (i.e. through diplomatic channels).

Article 10

103. Police Act No. 25 regarding the education of policemen, stipulates that knowledge and understanding of human rights, as well as of the need to protect these rights, should be incorporated at all levels of education of policemen.

104. Policemen should furthermore be educated, among other things, about:

(a) The concept of law;

(b) General police work and regulations concerning correct police behaviour;

(c) Instructions regarding the use of force, and

(d) The concept of criminal offence (see also paragraph 90).

Article 11

105. Interrogation of suspects and others is regulated in the Act on Criminal Procedure of 1914 (as well as in the new Draft Act on Criminal Procedure of 1987-1988), article 44. A suspect may not be interrogated for a period longer than six hours, excluding the time between 10 p.m. and 8 a.m. Article 49 of the Draft Act reads that the suspect has the right to remain silent.

Article 12

106. Investigation of allegations of torture in Aruba will follow the ordinary procedures for criminal cases. The Act on Criminal Procedure contains, in article 24, a provision that the public prosecutor shall, when he is being informed that an offence has been committed within his jurisdiction, or that a suspect of such an act is within his jurisdiction, be obliged to gather all information and, if necessary, hand this over to the judge with the requisitory as he deems appropriate.

107. In cases brought against policemen, a special Complaint Commission has been instituted, as referred to in paragraph 88.

Article 13

108. As mentioned before, the term "torture" is not employed as such in Aruban legislation, but it falls within the scope of the Penal Code. An allegation of torture shall therefore be investigated by the prosecuting authorities as described above.

Article 14

109. According to article 126a of the Act of Criminal Procedure, a victim of unjust detention can claim financial compensation for the damage caused by the detention.

110. The new Draft Act contains a similar provision, regarding not only detention, but all coercive measures taken against the victim.

Article 15

111. The Act of Criminal Procedure contains, in articles 301 to 307, rules for judgement of evidence, but it does not explicitly state that evidence obtained as a result of torture shall not be invoked as evidence in any proceedings. The courts are free to judge the validity of any evidence, but it is the general opinion, both in legal practice and doctrine, that the court shall not use or give any weight to evidence illegally obtained.

112. The draft Act states in article 49, paragraph 2, that in all cases in which a suspect is being heard, the judge or public official shall abstain from any action that has the tendency to obtain a statement which is not made in freedom.

Article 16

113. The acts described in article 16 will to a large extent be criminal acts under different provisions of the Penal Code. Such complaints will be investigated and prosecuted as ordinary criminal acts in conformity with the Act on Criminal Procedure.

## Annex I

Bulletin of Acts, Orders and Decrees of the Kingdom of the Netherlands, 1988 (478)

### Act of 29 September 1988 implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Act implementing the Convention on Torture)

We Beatrix, by the grace of God Queen of the Netherlands, Princess of Orange-Nassau etc., etc., etc.

Greetings to all who shall hear or see these presents! Be it known:

Whereas we have considered that statutory provisions must be made to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded at New York on 10 December 1984;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

Section 1

1. Assault causing bodily harm committed by a public official or other person acting in an official capacity in the exercise of his office on a person who has been deprived of his liberty, for the purpose of obtaining information or a confession, punishing that person, intimidating him or another person, or forcing him or another person to perform certain acts or to allow them to be performed, or out of contempt for that person's right to be treated as an equal human being shall, if such behaviour is of such a nature that it is capable of assisting the achievement of the objective in question, be deemed to constitute torture; the penalty upon conviction of this offence shall be a term of imprisonment not exceeding fifteen years or a fifth category fine.

2. The intentional inducement of a state of acute anxiety or any other form of serious mental disturbance shall be deemed to constitute assault.

3. If the offence leads to death, the offender shall be liable to life imprisonment or a term of imprisonment not exceeding twenty years or a fifth category fine.

Section 2

The following shall also be liable to the punishments described in the preceding Section:

(a) any public official or other person acting in an official capacity who, by employing one of the means referred to in Article 47, paragraph 1 (2) of the Criminal Code, incites another person to commit the form of assault referred to in Section 1 or intentionally allows another to commit the said form of assault;

(b) any person who commits the form of assault referred to in Section 1, if a public official or other person acting in an official capacity has, in the exercise of his office, incited him to do so by employing one of the means referred to in Article 47, paragraph 1 (2) of the Criminal Code or has intentionally allowed the said form of assault to be committed.

Section 3

Articles 42 and 43 of the Criminal Code shall not apply to the offences referred to in Sections 1 and 2.

Section 4

The acts referred to in Sections 1 and 2 shall be indictable offences.

Section 5

Dutch criminal law shall apply to any person who commits outside the Netherlands one of the offences described in Sections 1 and 2 of this Act.

Section 6

1. The term "public official" shall have the same meaning in this Act as in the Criminal Code.

2. For the purposes of the application of Dutch criminal law, the term "public official" shall be taken to include any person occupying a post in the public service of a foreign State.

Section 7

The following shall be added to Section 51a, subsection 2, of the Extradition Act:

- the offences referred to in Sections 1 and 2 of the Act implementing the Convention on Torture, in so far as the offence falls within the definition of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, concluded at New York on 10 December 1984 (Netherlands Treaty Series, 1985, 69).

Section 8

Point 5 of Section 1, subsection 1, of the Criminal Law in Wartime Act shall be renumbered point 6 and a new point 5 shall be added which shall read as follows:

5. Sections 1 and 2 of the Act implementing the Convention on Torture.

Section 9

In Section 1 of the War Crimes (Surrender of Suspects) Act, the word "or" before "Sections 1 and 2 of the Act implementing the Convention on Genocide" shall be replaced by a comma and after the words "Convention on Genocide" the words "or Sections 1 and 2 of the Act implementing the Convention on Torture" shall be added.

Section 10

1. This Act shall come into force on the date on which the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment enters into force for the Netherlands.

2. This Act may be cited as the Act implementing the Convention on Torture.

We order and command that this Act be published in the Bulletin of Acts, Orders and Decrees (Staatsblad), and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done at The Hague, 29 September 1988

Beatrix

F. Korthals Altes,
Minister of Justice

H. van den Broek,
Minister for Foreign Affairs

Published on 25 October 1988

F. Korthals Altes,
Minister of Justice

## Annex II

Amendment to the Police Act

Section 33a

1. Police officers may use force in the lawful performance of their duties if, bearing in mind the dangers accompanying the use of force, their objective justifies the use of force and cannot be achieved in any other way.

2. Wherever possible, a warning should be issued prior to the use of force.

3. A police officer may search the clothing of persons while exercising powers conferred on him by law or in order to carry out police duties if the facts or circumstances lead him to believe that there is an immediate danger to their lives or safety, to that of the police officer or to that of third parties and such a search is necessary to eliminate the danger.

4. The Public Prosecutor or Assistant Public Prosecutor before whom suspects or convicted persons who have been arrested or lawfully deprived of their liberty are taken may order that such persons be subjected to a body search, if the facts or circumstances lead him to believe that there is a danger to their lives or safety or to that of the official, and such a search is necessary to eliminate the danger.

5. The exercise of the powers referred to in subsections 1, 3 and 4 shall be reasonable and moderate in relation to the objective.

6. The provisions of the preceding subsections shall also apply to members of the Royal Dutch Military Constabulary in the lawful performance of their duties and to members of any other branch of the armed forces when assisting the police pursuant to Section 48.

## Annex III

Bulletin of Acts, Orders and Decrees of the Kingdom of the Netherlands, 1988 (577)

Articles 1 to 11 of the Decree of 14 December 1988 establishing a Code of Police Conduct

1: definitions

Article 1

In this decree the term "police officer" shall be taken to mean anyone whom the competent authorities have:

(a) appointed to a rank as referred to in Article 2, paragraph 1, of the 1958 Police Ranks Decree (Bulletin of Acts, Orders and Decrees 1957, 549);

(b) accepted for basic police training or at the Netherlands Police Academy, for the duration of his practical training;

(c) appointed an unsalaried officer of a municipal police force or the National Police Force;

(d) employed on a voluntary basis with a municipal police force or the National Police Force;

(e) appointed an officer of the National Criminal Investigation Department;

(f) appointed:

1. a court usher, court usher grade A or chief court usher,

2. technical vehicle inspector or

3. a rural auxiliary

in the National Police Force.

2: use of force

Article 2

1. If a police officer is acting, whether or not in close formation, under the authority of a superior officer who is present on the spot, he shall only use force on the express instructions of the said superior. The latter shall also specify what kind of force is to be used.

2. Paragraph 1 shall not apply in a situation in which Article 41 of the Criminal Code may be invoked or in the event that the superior officer has decided otherwise in advance.

Article 3

1. Except in situations in which Article 41 of the Criminal Code may be invoked, the use of a non-automatic firearm against persons and against vehicles containing persons is permitted only:

(a) in order to arrest a person who, it may reasonably be assumed, has a firearm ready for immediate use on his person and will use it against any person or:

(b) in order to arrest a person who is attempting to evade arrest, a committal hearing or any lawful deprivation of his liberty or has succeeded in doing so and who is suspected of or has been convicted of a serious offence which must be deemed to be a serious violation of the legal order.

2. Committing a serious offence is taken to include an attempt to commit or participation in such an offence as referred to in Articles 47 and 48 of the Criminal Code.

3. Firearms may not be used if the identity of the person to be arrested is known and it may reasonably be assumed that delaying arrest will not entail any unacceptable risk to the legal order.

Article 4

1. The use of a non-automatic firearm to quell a disturbance is permitted only on the instructions of the competent authority and during operations in close formation under the authority of a superior officer.

2. A disturbance as referred to in paragraph 1 shall be deemed to occur only where a group or groups of persons pose an immediate threat to the lives of others and to public order.

Article 5

The use of an automatic firearm against persons and against vehicles containing persons is permitted only in the event of a sudden unlawful assault on the police officer's person or that of another as referred to in Article 41 of the Criminal Code.

Article 6

1. Immediately before a police officer fires a firearm at a target he shall give a warning in a loud voice or in some other unambiguous manner that he is about to fire if the order he has given is not immediately obeyed. This warning, which may if necessary be replaced by a warning shot, may be omitted only if the circumstances do not permit such a warning to be given.

2. A warning shot shall be given in such a way that danger to persons or property is as far as possible avoided.

Article 7

The drawing of a firearm or the firing of a warning shot is permitted only in cases in which firing at a target is permitted.

Article 8

1. Any police officer who has used force (the definition of which includes the firing of a warning shot) shall immediately report such use, the reasons for it and any consequences thereof to his superior officer.

2. If the use of force has led to physical injury of any significance, and in all cases in which a firearm has been employed, the Public Prosecutor of the district in which the use of force took place shall be informed of the report referred to in the preceding paragraph.

3. If in the opinion of the superior officer referred to in paragraph 1 the consequences of the use of force so require, and in all cases where a weapon is used and if physical injury or death result, the report referred to in paragraphs 1 and 2 shall be made in writing within 48 hours.

4. If the use of force by means of a weapon took place on the express instructions of a superior officer, the report referred to in paragraph 3 shall be made by that officer.

5. The police officer shall be informed by his superior officer of the way in which the report has been processed.

3: searches in the interests of safety

Article 9

1. Officers shall conduct the search referred to in Section 33a, subsection 3 of the Police Act by running their hands superficially over the clothing of the person concerned; where possible, such searches shall be carried out by a police officer of the same sex as the person being searched.

2. The search referred to in Section 33a, subsection 4 of the Police Act shall be carried out by a police officer of the same sex as the person being searched.

Article 10

Any police officer who has carried out a search as referred to in Section 33a, subsection 3, of the Police Act shall make an immediate report of the search to his superior officer. The report shall state the reasons which led to the search being conducted.

4: assistance and medical care

Article 11

1. Police officers are obliged to remove or to have removed from the public highway in the most suitable manner persons who through the consumption of alcohol or for other reasons constitute an immediate danger to public order, to safety, to public health or to themselves. The public highway is taken to include all places immediately adjoining a public thoroughfare or accessible to the public or vehicles on a public highway or vessels on a public waterway provided such places are not in use as dwellings.

2. Persons as referred to in paragraph 1 who are found in the places referred to there may, if there is no alternative, be taken to the police station for assistance, provided that this is necessary for their own protection and that this does not take place against their will.

3. The persons referred to in paragraph 2 and persons deprived of their liberty shall be subject to a degree of supervision which accords with their condition.

---